



Make Privacy Your Choice

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September 13, 2004

Mr. Donald S. Clark, Secretary
Federal Trade Commission
CAN-SPAM Act
P. O. Box 1030
Merrifield, VA 22116-1030

Re: CAN-SPAM Act Rulemaking, Project No. R411008

Dear Mr. Secretary:

TRUSTe is pleased to provide comments in response to this Proposed Rulemaking by the Federal Trade Commission (the "Commission") pursuant to the Controlling the Assault of Non-Solicited Pornography and Marketing Act of 2003 ("CAN-SPAM Act").

About TRUSTe

TRUSTe is the leading online privacy brand. As an independent, nonprofit organization, TRUSTe is dedicated to enabling individuals and organizations to establish trusting relationships based on respect for personal identity and information in the evolving networked world. Founded in 1997, today TRUSTe runs the largest and award-winning global privacy certification and seal program, with more than 1,500 Web sites certified throughout the world, including those of AOL, Microsoft, IBM, Nationwide and The New York Times. Its seal programs are certified as safe harbors for the Children's Online Privacy Protection Act (COPPA) and the EU Safe Harbor Framework.

TRUSTe's programs have evolved since its inception to reflect changes in law, technology, industry practices and consumer needs. For example, TRUSTe has introduced Wireless Privacy Principles and Implementation Guidelines. Further, and specific to the issues presented in this Rulemaking, our License Agreement now includes program requirements regarding electronic mail. TRUSTe also significantly contributes to anti-spam efforts by operating an Independent Trust Authority ("ITA") for email.

In this model, TRUSTe works with anti-spam or legitimate email program providers to develop baseline email standards, certify email senders to the standards, and support dispute resolution.

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We believe that self-regulation can be an effective part of the overall solution to reducing spam and increasing respect for consumer choice.

IronPort's Bonded Sender is currently TRUSTe's primary effort as an ITA for email. The Bonded Sender Program, for which TRUSTe provides certification, oversight, and dispute resolution services, brings accountability to email with a unique complaint rate enforcement mechanism. TRUSTe certifies participating senders to a baseline set of standards that include consent with robust disclosure and easy unsubscribe tools, as well as technical requirements to ensure that mailers servers do not assist spammers. Senders must post a significant bond that is debited in the event that consumer complaint rates surpass set thresholds. ISPs participating in Bonded Sender's network agree to deliver email from Bonded Senders, producing increased delivery rates for senders who can maintain low complaint rates. In sum, Bonded Sender involves the consumer directly in the enforcement process and rewards senders who honor consumer preferences. This self-regulation model provides tangible economic incentives for the adoption of industry best practices and has the effect of elevating overall behavior in the industry. The Program's specific requirements are found at <http://www.bondedsender.com/standards.jsp>. Information on all TRUSTe programs may be viewed at our web site at <http://www.truste.org>.

Comments on Proposed Criteria for Determining "Primary Purpose"

TRUSTe has chosen to focus its comments on a few discrete questions, specifically relating to the proposed use of a message's subject line as a stand-alone indicator of the message's "primary purpose."¹

The Commission proposes to divide electronic messages that contain at least some promotional content into three categories:

- Messages containing only content that advertises or is promotional in nature.
- Messages containing promotional content as well as content pertaining to a transactional or relationship function (hereafter referred to as "partially transactional").
- Messages containing promotional content as well as content fitting into neither the category of promotional nor the category of relationship/transactional (hereafter referred to as "completely non-transactional").

The Commission proposes that the latter two types of messages, which it characterizes as "dual-purpose messages," be automatically categorized as "commercial" if the subject line would likely be reasonably interpreted by a recipient as advertising or promoting a product or service. The

¹ Our response focuses most specifically on the Commission's question B.j.

Commission further proposes that, if a message's subject line does not trigger "commercial" status, the message will be subjected to a second test, based on its content – the exact test to vary, depending on whether the message is partially transactional or completely non-transactional.

For a number of reasons, TRUSTe does not believe that a message's subject line should be assessed in a vacuum to determine possible "commercial" status.

First, we respectfully submit that, given the proposed parallel requirement that a message's body also be scrutinized for commercial content, the additional test of the subject line as a stand-alone indicator of "commercial" status is superfluous. Specifically, we note that a message with commercial content will almost certainly not contain such content in the subject line alone. Rather, a message with "commercial" content will invariably include that content in its body. In other words, "commercial" content may appear in both a message's subject line and body, or only in the body – but realistically never only in the subject line. Therefore, testing the subject line by itself adds nothing to the analysis of whether a message is "commercial." We accordingly propose that the Commission remove the proposed independent analysis of the subject line as an indicator of a message's "commercial" status.

Second, we note that considering the subject line in isolation from the rest of an electronic message does not comport in general with the way in which recipients read and evaluate their messages. Rather, to the extent consumers evaluate messages before opening them, they will generally consider both the subject line and the sender – and will, in fact, likely accord greater weight to the latter. Accordingly, in a very broad sense, assessing messages in a vacuum based only on the subject line conflicts with the general concept of evaluating electronic messages from the recipient's perspective.

Third, since the entire underlying premise of the proposed "primary purpose" test is that it is based on the recipient's reasonable perception, the ultimate presentation of the subject line, as viewed by the recipient, will be the sole relevant criterion. However, given that Internet service providers ("ISPs") routinely limit the length of the subject line actually presented to a recipient, senders have only limited control over this factor. While senders already must take this de facto editing by ISPs into account from a customer communications perspective, it raises much different issues to hinge potential legal liability on a criterion that in actuality is not in a sender's control. It is untenable to impose legal liability based on a factor not in the exclusive dominion of the person ultimately to be held liable.

Fourth, we believe that categorizing messages based purely on the subject line will transform the subject line from a versatile means of communication with customers into a mere rigid legal compliance mechanism. We are particularly concerned about this shift in the context of partially transactional messages, as we consider it of utmost importance that senders retain this flexibility in communicating with their customers. It would be lamentable to potentially hamper a sender's discretion to use the subject line to alert a customer based purely on how to most informatively communicate with that customer. We therefore strongly recommend that -- particularly in the case of partially transactional messages -- subject lines not be used as stand-alone criteria for labeling a message as "commercial."

Finally, the Commission has endorsed the concept of a "net impression" test in connection with completely non-transactional messages -- a perspective which we applaud. However, we believe that imposing a separate test, based purely on the assessment of the subject line in a vacuum, is in conflict with the "net impression" concept. Accordingly, once again, we do not believe the subject line should be used as a sole determinant of "commercial" status in this context.

For these reasons, we respectfully submit that the content of a subject line as delivered to the recipient not be used as a stand-alone factor in assessing whether an electronic message is deemed "commercial." Rather, in the case of partially transactional messages, we advocate removing it as a factor altogether. And, in the case of completely non-transactional messages, we advocate either removing it as a factor or, alternatively, simply adding the content of a subject line as one more factor in the "net impressions" test proposed by the Commission.

In conclusion, we applaud the Commission for the work it has done, and particularly for the public input it has solicited and deliberately considered, in connection with this and its other Proposed Rulemakings under the CAN-SPAM Act. We also consider it important to note the important role that self-regulatory programs such as TRUSTe's successful and highly-effective Bonded Sender continue to play in further best practices in the context of electronic mail.

Thank you for this opportunity to share our perspective on these issues. We welcome the opportunity to discuss these issues further or respond to any questions you may have.

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